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In the Matter of }
1983 Cable Royalty }
Distribution Proceeding }

Docket No. 84-1 83CD

ORDER

On January 29, 1986, Multimedia Entertainment, Inc. (Multimedia) filed a motion to establish certain procedures and requirements for the presentation of the direct case of Phase II. Multimedia raises the question of whether any party in Phase II is relying for any portion of its claim on public domain works. Multimedia cites National Association of Broadcasters v. Copyright Royalty Tribunal, 772 F. 2d 922 (D.C. Cir. 1985) in which the court stated that the Tribunal should provide opposing claimants with some means of obtaining information concerning the copyright status of programs for which other claimants seek royalties.

Multimedia states that MPAA has developed a list of 7,000 syndicated programs that were measured in the 1983 Nielsen special survey, which were made available to Multimedia in response to a discovery request by NAB. Multimedia believes it has identified nine works which are public domain, but that Multimedia has made no attempt to scrutinize the entire list of 7,000 programs because it claimed it would be too time-consuming and expensive. Multimedia believes only the Program Suppliers have the necessary information. Multimedia therefore has moved the Tribunal to require all Phase II parties to list, for each work, "(1) the name of the copyright owner; (2) whether the work was published with notice; (3) the date of publication, and (4) whether formal registration and, if appropriate, renewal of registration, was secured."

Multimedia's motion was opposed by both the Program Suppliers and NAB. The Program Suppliers first note that Multimedia's challenge is not timely, coming as it does only three weeks prior to submission of the Phase II direct case. Program Suppliers argue that a challenge to nine titles out of 7,000 should not trigger a massive evidentiary showing for the remaining titles. The Program Suppliers state that they are prepared to list all programs in their Phase II claim and supply the affidavits of the 79 Program Suppliers affirming their collective entitlement to royalties for these programs in the event that the Tribunal requires all Phase II claimants to present a similar showing.

NAB argues that the basis for Multimedia's motion is largely irrelevant to station-produced programs, the works NAB represents. Multimedia has raised a challenge to movies which are decades old which might have fallen from protection into the public domain. NAB only represents works which, at most, could

be five years old, and many of which could be completely protected by the notice of copyright without registration with the Copyright Office.

Conclusion

The Tribunal is aware of the requirement of the Court in NAB v. CRT, as stated by the Court, "the goal to be achieved is for the CRT to establish, consistent with orderly procedures and expeditious proceedings, a sensible way in which a good-faith examination of and challenge to copyright ownership can be effected." The word of the Court which the Tribunal wants to emphasize is "sensible." We find that the elements that must be weighed toward reaching a "sensible way" must include: timeliness, burden, and the probability of the validity of the challenge. All three elements in this instance weigh heavily against Multimedia. Multimedia has been aware of the Court's decision since August 30, 1985, and yet has chosen to wait until January 29, 1986 to file its motion, leaving almost no time for the other Phase II parties to respond fully and adequately. Multimedia must also be aware of the burden of coming forward with the precise information for thousands of titles, when the cumulative experience and expertise of the Tribunal in evaluating the claims of the Program Suppliers suggest that the overwhelming number of these titles will prove valid.

The Tribunal is mindful that the Court noted that "While it is emphatically not our function to mandate any specific procedure in this respect, the Tribunal could, for example, consider requiring that a claimant (as a condition for receiving royalties) place in the record a list of all programs for which it is seeking royalties." The suggestion to utilize such a list falls far short of mandating the specifics sought in the Multimedia motion.

The Tribunal considers that the list of the 7,000 titles of syndicated programs contained in the Neilsen study together with the requirement that all parties specify the portions of its claims thereto, will suffice to meet the standards required by the Court. This material will provide Multimedia with "the means" the Court refers to "of obtaining information covering the copyright status."

The specific details of the Court's suggestions, issued last August near the middle of the on-going proceeding, may be appropriate to consider at the beginning of future proceedings. At this late date, the CRT concludes it would be inappropriate to grant a motion for what amounts to a major shift in the relied upon rules, the substance of which goes far beyond the Court's suggestions. We find additional support for this conclusion in the Court's statement, under similar circumstances, that "it would be inappropriate at this late stage to penalize MPAA for its compliance with the Tribunal's existing regulations."

The Tribunal, thus, requires that all parties specify what portion of the referred-to Neilsen list they claim, as was done by Program Suppliers in the 1979 and 1980 proceedings, and furnish such information to the other Phase II parties and the Tribunal by February 18th. If, after consideration of this information,

any party wishes to challenge any of the titles, it should file such challenge, before the close of the direct case, with the Tribunal and other Phase II parties, supported by all relevant documentation which justifies its challenge. The Tribunal will then consider whether the presumption of ownership has been rebutted and whether to require more information from the other parties.

Edward W. Ray
Chairman

Dated: February 12, 1986